

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2009

(Argued: March 12, 2010

Decided: March 16, 2010)

Docket No. 10-0604-cv

- - - - -x
HIRAM MONSERRATE, individually and as an
elected official and member of the New
York State Senate, CELESTE RODRIGUEZ,
individually and as duly registered and
qualified voter in the New York State
13th Senatorial District, MICHAEL A.
NARDIELO, III, individually and as duly
registered and qualified voter in the
New York State 13th Senatorial District,
MONIFA AFIA BEY, individually and as duly
registered and qualified voter in the
New York State 13th Senatorial District,
NANCY TORRES, individually and as duly
registered and qualified voter in the
New York State 13th Senatorial District,
LORETTA HENDERSON, individually and as
duly registered and qualified voter in
the New York State 13th Senatorial
District, and MALIKA K. SHABAZZ,
individually and as duly registered and
qualified voter in the New York State
13th Senatorial District,

Plaintiffs-Appellants,

- v. -

NEW YORK STATE SENATE, MALCOLM A. SMITH,
in his official capacity as Temporary
President of the New York State Senate,
ANGELO J. APONTE, in his official

1 capacity as Secretary of the New York
2 State Senate, THOMAS P. DiNAPOLI, in
3 his official capacity as State
4 Comptroller of the State of New York,
5 ERIC T. SCHNEIDERMAN, in his official
6 capacity as a Senator of the State of
7 New York and Chair of the New York
8 State Senate Select Committee to
9 Investigate the Facts and Circumstances
10 Surrounding the Conviction of Hiram
11 Monserrate on October 15, 2009, DAVID
12 A. PATERSON, in his official capacity
13 as Governor of the State of New York,
14 RICHARD RAVITCH, in his official
15 capacity as Lieutenant Governor of the
16 State of New York, LORRAINE CORTES-
17 VAZQUEZ, in her official capacity as
18 Secretary of State for the State of
19 New York,

20
21 Defendants-Appellees.

22 - - - - -x
23

24 Before: JACOBS, Chief Judge, LYNCH, Circuit
25 Judge, and RESTANI, Judge.*
26

27 Appeal from an interlocutory order of the United States
28 District Court for the Southern District of New York
29 (Pauley, J.), denying a preliminary injunction that would
30 have unwound the expulsion of Hiram Monserrate from the New
31 York State Senate. We affirm.

32 NORMAN SIEGEL, New York, NY, for
33 Appellants.

* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

1 STEVEN J. HYMAN (Alan E. Sash
2 and Rachel Nicotra, on the
3 brief), McLaughlin & Stern, LLP,
4 New York, NY, for Appellants.
5

6 BARBARA D. UNDERWOOD, Solicitor
7 General of the State of New York
8 (Peter Karanjia, Special Counsel
9 to the Solicitor General, and
10 Sasha Samberg-Champion and Diana
11 R.H. Winters, Assistant
12 Solicitors General, on the
13 brief), Office of Andrew M.
14 Cuomo, Attorney General of the
15 State of New York, for
16 Appellees.
17

18 DENNIS JACOBS, Chief Judge:

19 Hiram Monserrate, who has been expelled from the New
20 York State Senate, along with six voters in New York's 13th
21 Senatorial District who voted for Monserrate (the
22 "Monserrate voters") (collectively, the "Monserrate
23 Appellants"), pursue this expedited appeal from the denial
24 of a preliminary injunction in the United States District
25 Court for the Southern District of New York (Pauley, J.).
26 The requested preliminary injunction sought primarily to
27 unwind Monserrate's expulsion and to cancel the Special
28 Election scheduled for March 16, 2010. We affirm.

29
30 **I**

31 On November 4, 2008, Monserrate received approximately

1 66 percent of the votes cast in New York's 13th Senatorial
2 District, thereby winning election to a two-year term as
3 State Senator. On January 7, 2009, he took the oath of
4 office and assumed a seat in the Senate.

5 On December 19, 2008--after the election but before the
6 oath of office--a woman suffered injuries to her face and
7 left arm in Monserrate's apartment and in the common area of
8 his apartment building.

9 After assuming a seat in the Senate, Monserrate was
10 indicted on three felony and three misdemeanor counts of
11 assault arising out of the December incident. On October
12 15, 2009, Monserrate was convicted of one count of
13 misdemeanor reckless assault after a bench trial in New York
14 Supreme Court, Queens County.¹ On December 4, 2009, he was
15 sentenced to three years of probation, 250 hours of
16 community service, one year of domestic-abuse counseling,
17 and a \$1,000 fine. A "family offense" order of protection
18 required Monserrate to refrain from any contact with the

¹ Pursuant to New York Penal Law § 120.00(2), a person is guilty of assault in the third degree when he "recklessly causes physical injury to another person."

1 woman for a period of five years.² Monserrate has appealed
2 from his judgment of conviction; the appeal remains pending.

3 On November 9, 2009--after Monserrate's conviction but
4 prior to his sentencing--the Senate adopted Resolution 3409,
5 formally establishing a "Select Committee to Investigate the
6 Facts and Circumstances Surrounding the Conviction of Hiram
7 Monserrate on October 15, 2009" (the "Select Committee").
8 Resolution 3409 recited the "seriousness of the[] domestic
9 violence charges" brought against Monserrate, found that
10 "the circumstances surrounding [the charges] warrant further
11 investigation by the Senate," and observed that those
12 circumstances "may warrant the imposition of sanctions by
13 the Senate." The Select Committee was "authorized and
14 directed to investigate the facts and circumstances relating
15 to the conviction against Senator Monserrate," and was
16 required to "report to the Senate with its recommendations."
17 Resolution 3409 also directed the Select Committee to
18 "ensure a full and fair investigation, ensure fairness in

² A "family offense" order of protection may be granted "[w]hen a criminal action is pending involving a complaint charging any crime or violation between spouses, former spouses, parent and child, or between members of the same family or household" N.Y. Crim. Proc. Law § 530.12(1).

1 the hearing process, specifically providing Senator
2 Monserrate and his counsel with notice of all public
3 committee proceedings, as well as ensuring opportunities for
4 Senator Monserrate to be heard.”

5 The Select Committee convened on six occasions. It
6 reviewed, inter alia, the trial record, certain grand jury
7 testimony, phone records, a notarized statement by the
8 victim, and Monserrate’s media interviews. Monserrate
9 declined the invitation to present arguments and evidence in
10 person, through counsel, or in writing.

11 The unanimous report of the Select Committee (the
12 “Report”), issued January 13, 2010, recommended that
13 Monserrate be expelled or that he be censured with
14 revocation of privileges:

15 Having considered the available evidence and
16 evaluated the facts relating to the conduct that
17 provided the basis for Senator Monserrate’s
18 conviction, the Select Committee finds that this
19 case is serious enough to warrant a severe
20 sanction. In doing so, we are mindful that
21 ultimately, the voters of Senator Monserrate’s
22 district, where he plans to run for re-election,
23 will decide whether or not he is returned to
24 office.

25
26 The Select Committee finds that the nature and
27 seriousness of Senator Monserrate’s conduct, as
28 demonstrated by the surveillance video and other
29 un rebutted evidence outlined in this Report,
30 showed a reckless disregard for Ms. Giraldo’s

1 well-being and for the severity of her injury. We
2 therefore find, that under the particular facts
3 and circumstances presented here, Senator
4 Monserrate's misconduct damages the integrity and
5 the reputation of the New York State Senate and
6 demonstrates a lack of fitness to serve in this
7 body.

8
9 Accordingly, the Select Committee recommends
10 that Senator Monserrate be sanctioned by the full
11 Senate, and that the Senate vote to impose one of
12 two punishments: expulsion, or in the alternative,
13 censure with revocation of privileges.

14
15 The Special Committee further concluded that (i) "Senator
16 Monserrate's assault . . . was a crime of domestic violence
17 and therefore in direct contravention of New York's well-
18 established 'zero-tolerance' policy in such matters," and
19 (ii) "Senator Monserrate has failed to accept responsibility
20 for his misconduct, or to cooperate in any way with the work
21 of the Select Committee."

22 On February 9, 2010, the Senate voted 53 to 8 to expel
23 Monserrate. Resolution 3904 "condemn[ed] the conduct of
24 Senator Monserrate surrounding his conviction for reckless
25 assault" and concluded that his "behavior has brought
26 disrepute on the Senate, and damaged the honor, dignity and
27 integrity of the Senate." The Senate resolved that such
28 conduct "is incompatible with the duties of the Senate to
29 uphold public confidence in government and promote the

1 administration of justice under law," and further resolved
2 that Monserrate's actions "in totality are not compatible
3 with the responsibilities of the office, and with the
4 qualifications and behavior expected of and by a State
5 Senator of New York."

6 On February 10, 2010, Governor David A. Paterson
7 proclaimed a Special Election to be held on March 16, 2010.
8 On February 11, 2010, the Monserrate Appellants filed this
9 action pursuant to 42 U.S.C. § 1983 seeking a temporary
10 restraining order and a preliminary injunction. The same
11 day, the district court denied the motion for a temporary
12 restraining order. On February 19, 2010, the district court
13 denied the motion for a preliminary injunction. The
14 Monserrate Appellants timely appealed and this Court granted
15 their motion for an expedited appeal.

17 II

18 "A preliminary injunction is an extraordinary remedy
19 never awarded as of right." Winter v. Natural Res. Def.
20 Council, Inc., 129 S. Ct. 365, 376 (2008). "We review the
21 denial of a preliminary injunction for abuse of discretion."
22 Lynch v. City of N.Y., 589 F.3d 94, 99 (2d Cir. 2009). "A

1 district court has abused its discretion if it has (1) based
2 its ruling on an erroneous view of the law, (2) made a
3 clearly erroneous assessment of the evidence, or (3)
4 rendered a decision that cannot be located within the range
5 of permissible decisions.” Id. (internal quotation marks
6 omitted).

7

8 **A**

9 The Second Circuit has articulated the following
10 standard for granting a preliminary injunction:

11 In general, the district court may grant a
12 preliminary injunction if the moving party
13 establishes (1) irreparable harm and (2) either
14 (a) a likelihood of success on the merits, or (b)
15 sufficiently serious questions going to the merits
16 of its claims to make them fair ground for
17 litigation, plus a balance of the hardships
18 tipping decidedly in favor of the moving party.

19
20 Id. at 98 (internal quotation marks omitted). However, a
21 plaintiff cannot rely on the “fair ground for litigation”
22 alternative in challenging “governmental action taken in the
23 public interest pursuant to a statutory or regulatory
24 scheme.” Plaza Health Labs., Inc. v. Perales, 878 F.2d 577,
25 580 (2d Cir. 1989). The Monserrate Appellants therefore
26 must establish a likelihood of success on the merits to

1 succeed on appeal.³

2 The district court did not err in determining that the
3 Monserrate Appellants failed to establish a likelihood of
4 success on the merits of any of the three claims they press
5 on appeal.

6

7 **B**

8 The voting rights claim asserts that Monserrate's
9 expulsion violates voting rights under the First and
10 Fourteenth Amendments of the United States Constitution, but
11 is largely ambiguous as to the specific rights that are

³ Because we conclude that the Monserrate Appellants fail to establish a likelihood of success on the merits of any of the claims they press on appeal, several issues are obviated: (i) whether they establish irreparable injury; (ii) whether their requested relief is properly framed as a mandatory preliminary injunction or a prohibitory preliminary injunction, see Mastrovincenzo v. City of N.Y., 435 F.3d 78, 89 (2d Cir. 2006); and (iii) any tension between the Second Circuit standard set forth above the line and the Supreme Court's recent articulation of the preliminary injunction standard, see Winter, 129 S. Ct. at 374 ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."). The third issue is obviated because the Monserrate Appellants fail to establish a likelihood of success on the merits of any claim, a failure that is fatal under both standards.

1 infringed. However, assuming that Monserrate's expulsion
2 burdens constitutional rights related to voting and
3 political association, any such burden is justified by the
4 state interest in maintaining the integrity of the Senate.

5 **Flexible Framework.** The district court did not err in
6 declining to apply strict scrutiny; indeed, it is an
7 "erroneous assumption that a law that imposes any burden
8 upon the right to vote must be subject to strict scrutiny."
9 Burdick v. Takushi, 504 U.S. 428, 432 (1992). Rather, it is
10 useful to look to "a more flexible standard" in which "the
11 rigorousness of our inquiry into the propriety of a state
12 [action] depends upon the extent to which a challenged
13 [action] burdens First and Fourteenth Amendment rights."
14 Id. at 434. When such "rights are subjected to severe
15 restrictions, the [action] must be narrowly drawn to advance
16 a state interest of compelling importance"; but when such
17 rights are subjected to less than severe burdens, "the
18 State's important . . . interests are generally sufficient
19 to justify the restrictions." Id. (internal quotation marks
20 and citations omitted); see also Anderson v. Celebrezze, 460
21 U.S. 780, 789 (1983) (directing courts to balance "the
22 character and magnitude of the asserted injury" against "the

1 precise interests put forward by the State as justifications
2 for the burden imposed"); accord Schulz v. Williams, 44 F.3d
3 48, 56 (2d Cir. 1994). Therefore, if the burden imposed is
4 less than severe and reasonably related to the important
5 state interest, the Constitution is satisfied.

6 It seems clear enough that this flexible framework,
7 used in ballot access cases, is not limited to the pre-vote
8 context. The Supreme Court "minimized the extent to which
9 voting rights are distinguishable from ballot access cases,"
10 Burdick, 504 U.S. at 438, because "the rights of voters and
11 the rights of candidates do not lend themselves to neat
12 separation," Bullock v. Carter, 405 U.S. 134, 143 (1972).
13 Furthermore, the Monserrate Appellants fail to offer a
14 persuasive reason why we should not be guided by this
15 flexible framework in the post-vote context.

16 **Less than severe burden.** For at least two reasons, the
17 district court did not err in determining that Monserrate's
18 expulsion imposed a less than severe burden. To "evaluate
19 the weight of the burden imposed by" Monserrate's expulsion,
20 "we proceed by the totality approach." Schulz, 44 F.3d at
21 56 (internal quotation marks omitted).

22 First, the district court properly reasoned that the

1 Special Election will reduce any burden imposed on voting
2 rights. It will (i) reduce the amount of time that the
3 voters of the 13th Senatorial District are without
4 representation, (ii) allow those voters to exercise their
5 voting rights anew, and (iii) provide those voters an
6 opportunity to re-elect Monserrate should they choose to do
7 so following his misdemeanor conviction. That there would
8 be no Special Election but for Monserrate's expulsion, does
9 not diminish the Special Election's value.

10 Second, the district court properly found that the
11 burden (if any) imposed by a Senator's resignation or death
12 is a useful analog to the burden (if any) imposed by
13 Monserrate's expulsion. In their reply brief, the
14 Monserrate Appellants concede that a vacancy automatically
15 created by operation of New York Public Officers Law
16 § 30(1)(e)--based on a conviction for a felony or a crime
17 involving a violation of the oath of office--need not "pass
18 muster under equal protection analysis." The impact on
19 voting rights is the same whether the vacancy arises by
20 death or expulsion.

21 **Justification.** The district court did not abuse its
22 discretion in determining that Monserrate's expulsion

1 vindicates an important state interest in maintaining the
2 integrity of the Senate. It is fundamental that a
3 legislature has an important interest in upholding its
4 reputation and integrity. See, e.g., In re Chapman, 166
5 U.S. 661, 668 (1897) (recognizing that Congress “necessarily
6 possesses the inherent power of self-protection”); French v.
7 Senate of State of Cal., 146 Cal. 604, 606 (1905) (“[E]very
8 legislative body in which is vested the general legislative
9 power of the state, has the implied power to expel a member
10 for any cause which it may deem sufficient.”); Hiss v.
11 Bartlett, 69 Mass. 468, 473 (1855) (“The power of expulsion
12 is a necessary and incidental power, to enable the house to
13 perform its high functions, and is necessary to the safety
14 of the State. It is a power of protection.”). Although
15 “[n]o power to . . . expel a member, is contained in the
16 [New York] State Constitution [t]he necessity of
17 [such a] power[] . . . is apparent, and is conceded in all
18 the authorities.” People ex rel. McDonald v. Keeler, 99
19 N.Y. 463, 481 (1885).

20 Moreover, Monserrate’s expulsion is reasonably related
21 to securing the Senate’s integrity. Resolution 3904
22 recognized New York’s “zero tolerance policy for domestic

1 violence," determined that Monserrate's conduct "is
2 incompatible with the duties of the Senate to uphold public
3 confidence in government and promote the administration of
4 justice under law," and is "in totality . . . not compatible
5 with the responsibilities of the office, and with the
6 qualifications and behavior expected of and by a State
7 Senator of New York." Given these determinations,
8 Monserrate's expulsion is reasonably related to protecting
9 the Senate's integrity.⁴

10 Accordingly, the district court did not abuse its
11 discretion in determining that the flexible framework
12 articulated in Burdick, Anderson, and Schulz is useful to
13 analyzing any burden on voting rights imposed by post-

⁴ The Monserrate Appellants misconstrue the relevant state interest. The district court remarked that "New York has an interest in the orderly operation of its legislature." Based on this remark, the Monserrate Appellants argue that such an interest cannot justify Monserrate's expulsion because the conduct at issue occurred prior to Monserrate's assumption of a Senate seat and does not bear on his Senate responsibilities. This argument ignores the district court's further explication of the state interest: "In concluding that Monserrate 'severely damaged the institution's honor, dignity, integrity, and public reputation,' the Senate articulated its legitimate state interest." The district court did not abuse its discretion in determining that the Senate's "exercise of the expulsion power was a reasonable way to satisfy that interest."

1 election actions; that any burden imposed by Monserrate's
2 expulsion is less than severe; and that the protection of
3 the Senate's integrity justifies the expulsion. The
4 Monserrate Appellants thus fail to establish a likelihood of
5 success on the merits of the voting rights claim.

6 **Equal Protection.** The Monserrate Appellants, relying
7 on two district court cases from the 1970s, raise the
8 subsidiary argument (sounding in equal protection), that
9 during the period between Monserrate's expulsion and the
10 Special Election--approximately five weeks--the citizens of
11 the 13th Senatorial District lacked representation that
12 citizens in other districts enjoyed. See Kucinich v.
13 Forbes, 432 F. Supp. 1101, 1117 (N.D. Ohio 1977) (finding
14 that "different classes of voters were established by [the]
15 City Council's suspension of Gary Kucinich"); Ammond v.
16 McGahn, 390 F. Supp. 655 (D.N.J. 1975) (finding that the
17 exclusion of a state senator from her party's caucus
18 "created two classes of voters. One class consists of those
19 citizens whose Senators could effectively participate fully
20 in the legislative process and another class whose Senator
21 could participate only to a limited degree."), rev'd on
22 other grounds, 532 F.2d 325 (3d Cir. 1976). But they

1 concede that a vacancy arising when a Senator resigns or is
2 convicted of a felony is not subject to equal protection
3 analysis. Since (as discussed above) the impact of such a
4 vacancy on voters' rights is identical to the impact of
5 Monserrate's expulsion, the concession is fatal.

6 Moreover, concession or no concession, the voters of
7 every Senatorial District are alike subject to the expulsion
8 of their elected representative pursuant to Legislative Law
9 § 3. See Rodriguez v. Popular Democratic Party, 457 U.S. 1,
10 10 (1982) ("[T]he Puerto Rico statute at issue here does not
11 . . . afford unequal treatment to different classes of
12 voters or political parties. . . . [T]he interim appointment
13 provision applies uniformly to all legislative vacancies,
14 whenever they arise."). The Monserrate Appellants do not
15 contend that the Senate was motivated to expel Monserrate by
16 any invidious bias against the voters of the 13th Senatorial
17 District.

18 Accordingly, the Monserrate Appellants fail to
19 establish a likelihood of success on the merits of the
20 subsidiary argument.

21
22 C

1 The Monserrate Appellants challenge Legislative Law § 3
2 on the grounds of as-applied and facial vagueness and
3 overbreadth. Prudence dictates that a federal court should
4 exercise a respectful reluctance to interfere in the
5 measures taken by a state legislature to regulate its
6 affairs, discipline its members, and protect its integrity
7 and good name.

8 Considerations of prudence aside, a comparison of
9 Legislative Law § 3 with Article I, section 5 of the United
10 States Constitution provokes considerable skepticism of the
11 Monserrate Appellants' federal due process challenges.
12 Legislative Law § 3 provides that "[e]ach house has the
13 power to expel any of its members, after the report of a
14 committee to inquire into the charges against him shall have
15 been made." N.Y. Legis. Law § 3. The United States
16 Constitution, Article I, section 5, provides that "[e]ach
17 House may determine the Rules of its Proceedings, punish its
18 Members for disorderly Behaviour, and, with the Concurrence
19 of two thirds, expel a Member." It is not absolutely clear
20 that the "disorderly Behaviour" ground for punishment in any
21 way limits Congress's expulsion power. Even assuming it
22 does, the wording does little to guide, channel, or limit

1 that power.⁵ Legislative Law § 3 is (as vigorously argued)
2 quite vague, but it is not appreciably more vague than the
3 counterpart provision in the United States Constitution.
4 And it would therefore be anomalous to rule that the
5 Constitution prohibits a state legislature from exercising,
6 in the regulation of its internal affairs, a latitude
7 comparable to that expressly allowed to Congress.

8 Moreover, as Appellees persuasively argue, while
9 Legislative Law § 3 establishes certain *procedural*
10 prerequisites to expulsion, it is not the sole source of
11 guidance on the substantive standard to be applied to
12 expulsion decisions. Rather, the Senate had access to a
13 long tradition, in New York and elsewhere, of assessing the
14 fitness of members of a legislative body to hold office, and
15 the Select Committee made explicit reference to that
16 tradition in making its recommendations with respect to
17 Monserrate. While this standard is hardly precise, it is
18 difficult to see how a legislature's "inherent power of

⁵ The Supreme Court offered the following gloss on Article I, section 5: "The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member." In re Chapman, 166 U.S. 661, 669 (1897). This gloss also does little to guide, channel, or limit Congress's expulsion power.

1 self-protection," In re Chapman, 166 U.S. at 668, can be
2 reduced to a more predictable formula.

3 "The 'void-for-vagueness' doctrine is chiefly applied
4 to criminal legislation. Laws with civil consequences
5 receive less exacting vagueness scrutiny." Arriaga v.
6 Mukasey, 521 F.3d 219, 222-23 (2d Cir. 2008). In light of
7 the historical acceptance of an extremely broad standard for
8 legislatures' decisions about the fitness of its members, a
9 court asked in effect to review such a decision
10 appropriately applies a less exacting, and more deferential,
11 test of vagueness than that appropriate in judging statutes
12 that impose criminal punishments on ordinary citizens. Like
13 Article I, section 5, the standard applied in New York does
14 not fail that test.

15 The Monserrate Appellants thus fail to establish a
16 likelihood of success on the merits of their challenge to
17 Legislative Law § 3.

18
19 **D**

20 The Monserrate Appellants press a claim that Monserrate
21 was deprived of a liberty interest in his reputation without
22 due process of law--a so-called "stigma-plus" claim. To

1 prevail on such a claim, they must prove "(1) the utterance
2 of a statement . . . that is injurious to . . . reputation,
3 that is capable of being proved false, and that he or she
4 claims is false, and (2) some tangible and material state-
5 imposed burden in addition to the stigmatizing statement."
6 Velez v. Levy, 401 F.3d 75, 87 (2d Cir. 2005) (internal
7 quotation marks and ellipsis omitted). But, critical to
8 this appeal, "the availability of adequate process defeats a
9 stigma-plus claim." Segal v. City of New York, 459 F.3d
10 207, 213 (2d Cir. 2006).

11 "[D]ue process is flexible and calls for such
12 procedural protections as the particular situation demands."
13 Morrissey v. Brewer, 408 U.S. 471, 481 (1972). "In
14 determining how much process is due, a court must weigh (1)
15 the private interest affected, (2) the risk of erroneous
16 deprivation through the procedures used and the value of
17 other safeguards, and (3) the government's interest."
18 Spinelli v. City of N.Y., 579 F.3d 160, 170 (2d Cir. 2009)
19 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

20 The private interest factor clearly favors the
21 Monserrate Appellants, see Patterson v. City of Utica, 370
22 F.3d 322, 336 (2d Cir. 2004) (recognizing that a stigma-plus

1 claim affects "the plaintiff's reputational interest, and
2 how that interest can [a]ffect his standing in the community
3 and his future job prospects"), and the government interest
4 factor clearly favors the Appellees, see Segal, 459 F.3d at
5 215 (recognizing that "[t]he government interest at stake in
6 a stigma-plus claim is its ability to execute and explain
7 its personnel decisions quickly"). The remaining--and
8 decisive--factor concerns the "risk that the false charges
9 against the plaintiff will go unrefuted and that his name
10 will remain stigmatized." Patterson, 370 F.3d at 336. "The
11 risk will vary depending on the effectiveness of the
12 procedures available and the promptness by which they are
13 afforded." Segal, 459 F.3d at 215.

14 The pre-expulsion process available to Monserrate
15 sufficiently reduced the risk that the charges against him
16 would go unrefuted. "The touchstone of due process, of
17 course, is the requirement that a person in jeopardy of
18 serious loss (be given) notice of the case against him and
19 opportunity to meet it." Spinelli, 579 F.3d at 169
20 (internal quotation marks omitted).

21 The district court did not abuse its discretion in
22 determining that the notice that Monserrate received was

1 sufficient. "The particularity with which alleged
2 misconduct must be described varies with the facts and
3 circumstances of the individual case; however, due process
4 notice contemplates specifications of acts or patterns of
5 conduct, not general, conclusory charges unsupported by
6 specific factual allegations." Id. at 172. Resolution 3409
7 notes the "seriousness of the[] domestic violence charges"
8 against Monserrate, indicates that "further investigation"
9 into the "circumstances surrounding them" is "warrant[ed],"
10 and further indicates that Monserrate's conduct "may warrant
11 the imposition of sanctions by the Senate." It established
12 "a Select Committee of the Senate to investigate the facts
13 and circumstances surrounding the conviction of Senator
14 Hiram Monserrate" and "authorized and directed" the Select
15 Committee "to investigate th[ose] facts and circumstances."
16 Resolution 3409 thus notified Monserrate of the parameters
17 of the Select Committee's investigation. Moreover, at least
18 one letter from Monserrate's counsel to the Select
19 Committee's counsel argued that expulsion is not a
20 legitimate sanction, thereby acknowledging Monserrate's

1 awareness that expulsion was a possible recommendation.⁶

2 Nor did the district court abuse its discretion in
3 determining that Monserrate received a sufficient
4 opportunity to be heard. "The timing and nature of the
5 required hearing will depend on appropriate accommodation of
6 the competing interests involved." Krimstock v. Kelly, 306
7 F.3d 40, 51 (2d Cir. 2002) (internal quotation marks
8 omitted). In accordance with New York Civil Rights Law
9 § 73(3), Monserrate's counsel was informed that Monserrate
10 or his counsel could testify and "present arguments or
11 evidence . . . through an oral presentation" or present
12 "arguments or . . . any evidence in writing." Moreover,
13 Monserrate was invited to "submit proposed relevant
14 questions in advance" to be asked by the Select Committee.
15 Monserrate thus had an "opportunity to present reasons,
16 either in person or in writing, why proposed action should
17 not be taken," Cleveland Bd. of Educ. v. Loudermill, 470
18 U.S. 532, 546 (1985), but declined to avail himself of that

⁶ In any event, the core of Monserrate's stigma-plus claim is not that he was deprived of his Senate seat without due process, but that he was deprived of his *reputation* without due process. Whether he had notice that he might be expelled, rather than merely censured, is thus peripheral to his due process contention.

1 opportunity.

2 Monserrate contends that any such opportunity was
3 impaired because (i) he was not "given copies of the
4 materials considered by the Select Committee," (ii) he was
5 not able to cross-examine the two witnesses that Select
6 Committee staff attorneys interviewed,⁷ and (iii) five of
7 the six meetings of the Select Committee were held in
8 executive session, closed to the public.⁸ Even if the
9 process Monserrate received did not include these features,
10 he nevertheless received a sufficient opportunity to clear
11 his name--and that is all the Constitution requires.

12 Accordingly, the district court did not abuse its
13 discretion in determining that the Monserrate Appellants
14 failed to establish a likelihood of success on the merits of

⁷ The district court observed that "the Select Committee heard from no witnesses but relied on the transcript of Monserrate's criminal trial where he had a strong interest in defending himself." This observation may be misleading. Staff attorneys of the Select Committee interviewed two individuals, Mr. Nieves and Mr. Castro, in connection with a notarized statement by the victim of Monserrate's assault, and reported on those interviews to the Select Committee on January 13, 2010.

⁸ The transcripts of the Select Committee meetings were posted on the internet on January 19, 2010, after the Report issued but well in advance of the Senate's February 9, 2010 vote to expel Monserrate.

1 the stigma-plus claim.⁹

2

3

CONCLUSION

4 The district court did not abuse its discretion in
5 determining that the Monserrate Appellants failed to
6 establish a likelihood of success on the merits of any of
7 the claims they press on appeal. We thus need not reach any
8 of the other arguments advanced by the parties. For the
9 foregoing reasons, we affirm the district court's denial of
10 the preliminary injunction.

11

⁹ Even if Monserrate were to prevail on his stigma-plus claim, the appropriate remedy presumably would be a "name-clearing" hearing and/or damages, rather than an injunction reinstating him in the Senate and cancelling the Special Election.